Editor's note: Reconsideration denied by order dated April 9, 1981

RACHAEL TOPSEKOK

IBLA 75-486 Decided January 16, 1976

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application, F-031948.

Affirmed.

1. Alaska: Native Allotments--Withdrawals and Reservations: Effect of

   An allotment right is personal to one who has fully complied with the law and the regulations. An applicant for a Native allotment on land withdrawn from appropriation and reserved for lighthouse purposes by Executive Order, subject to valid existing rights, must have completed the 5-year period of substantially continuous use and occupancy prior to the withdrawal in order to be eligible for an allotment.

2. Alaska: Native Allotments

   The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen for himself (or as head of family) and not as a minor, dependent child occupying or using the land in the company of his parents.

3. Alaska: Native Allotments--Rules of Practice: Hearings

   An evidentiary hearing is not required where a decision is based upon the facts

> as stated by the applicant, there is no dispute as to any material fact, and the sole question presented is a legal issue.

APPEARANCES: John Scott Evans, Esq., Alaska Legal Services Corporation, Nome, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Pursuant to the Alaska Native Allotment Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended, ch. 891, 70 Stat. 954, 1/ the Bureau of Indian Affairs filed Native allotment application F-031948 on behalf of appellant, in which she claimed use and occupancy from 1960 to the present time. By decision dated May 14, 1975, the Alaska State Office, Bureau of Land Management, rejected the application. The grounds were that the involved land had been withdrawn by Executive Order 4257, dated June 27, 1925, and reserved for lighthouse purposes, subject to existence of valid rights, and that appellant had not submitted evidence to show her occupancy began 5 years prior to the withdrawal date.

On appeal appellant contends: she began her occupancy in 1915 and continued to date; she used the land for fishing and seasonal residence purposes from 1915 to 1930, and has continued her use through the summer of 1975; a field examination would show her old food cache, campsite, and fish and meat drying racks; and interviews would show the length of her use. She requests a hearing, and that it be held at Nome or Teller. As no field investigation has been held, in the alternative, she requests a remand to BLM for an investigation of her use and occupancy. She further urges that Executive Order 4257 withdrew the land subject to valid existing rights and that her right is a prior existing right. Finally she states she should not lose her allotment for the failure during the 30- and 60-day periods provided by BLM to locate witnesses to her early use. She also contends that tacking of ancestral occupancy is allowed.

As is set forth in the decision below, appellant filed a Native allotment application for this land:

> Beginning at a point at mean high tide line on the north spit between Grantley Harbor and Port Clarence, approximately 4-1/8 miles northeasterly of the village of Teller, Alaska, in approximate

---

1/ This statute was repealed by § 18(a) of the Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973), subject to applications pending before the Department on December 18, 1971.

> latitude 65 degrees 16 feet 42 inches north, longitude 166 degrees 20 feet 33 inches west; thence north 523 feet; thence east 396 feet, more or less, to an intersection with mean high tide line; thence southerly 660 feet more or less, with mean high tide line; thence northwesterly 528 feet more or less, with mean high tide line to the point of beginning, as shown on the map which represents a segment of U.S.G.S. Teller (B-3) Quadrangle, containing approximately 8 acres.

The subject land was withdrawn by Executive Order 4257, dated June 27, 1925, for lighthouse purposes.

The statement of reasons includes affidavits from Rachael Topsekok, Jake Mingoona, and David Kakaruk, respectively.

In her affidavit, appellant says she personally used the land since the 1930's; she accompanied her parents and other family members while they used this land from 1915 to 1930; witnesses to her use of the land prior to 1925 are hard to locate but she will search for them; and she could show the necessary use if she had a fact finding hearing. Jake Mingoona in his affidavit said appellant, his sister, has used the land for over 60 years; that she went there every year as a small child in Wales, and was accompanied by family members from 1915 to 1930, after which time she alone continued the family use of the land. She never left the land and was always treated as the rightful owner, by the Government, the local villagers, and her family members. David Kakaruk, a friend and neighbor of appellant, stated in his affidavit: he had seen applicant use the land; there was a fish drying rack on the land; applicant used the land for fishing; she began using the land in 1910 and knew of no years she did not use it; that applicant had a father and mother when she began using the land; and no one else is using the land except applicant.

The Alaska Native Allotment Act, supra, authorized the Secretary of the Interior to allot not more than 160 acres of land in Alaska to an Indian, Aleut, or Eskimo who is both a resident and a Native of Alaska and who is 21 years old or the head of a family. The statute clearly states that the land to be allotted must be "vacant, unappropriated, and unreserved." 70 Stat. 954. In addition, the statute mandates that the applicant must make satisfactory proof to the Secretary of the Interior of "substantially continuous use and occupancy of the land for a period of five years." 70 Stat. 954.

[1] An allotment right is personal to one who has fully complied with the law and the regulations and an applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish the right. Susie Ondola, 17 IBLA 359, 361 (1974). 2/ The applicant for a Native allotment must have completed the 5-year period of substantially continuous use and occupancy prior to a withdrawal of the land in order to qualify for an allotment. Susie Ondola, supra at 361. Thus, lands withdrawn from appropriation by Executive Order 4257 dated June 27, 1925, and reserved for lighthouse purposes, subject to existence of valid rights, are not open to a Native allotment claim unless use and occupancy of applicant was established prior to June 27, 1925.

[2] The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen for himself (or as head of a family) and not as a minor, dependent child occupying or using the land in the company of his parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76, 78 (1974). This does not mean that a minor may never establish qualifying use or occupancy--the issue is the nature of the use and occupancy. It must be achieved by an independent citizen in his own right and it must be at least potentially exclusive. John Nanalook, 17 IBLA 353, 355; 43 CFR 2561.0-5(a).

Appellant's own evidence establishes that her use and occupancy of the subject land prior to 1925 was in the company of her parents and other family members. The affidavit of appellant states that "I have personally used this land since the 1930's * * *." Appellant further declares that "I accompanied my parents and other family members while they used this land from 1915 to 1930." The affidavit of Jake Mingoona submitted on behalf of the appellant confirms that the use and occupancy of the land by the appellant was in the company of family members from 1915 to 1930 from which latter time appellant alone continued to use the land. Appellant's own evidence clearly shows an absence of qualifying use and occupancy as an independent citizen prior to the withdrawal in 1925.

[3] Appellant's request for a hearing is denied. Our decision in this case is based on the facts as they are disclosed

---

2/ The argument that aboriginal use and occupancy and continued use and occupancy by applicant's ancestors preclude the segregative effect of a withdrawal and that applicants may use these rights as a basis for claiming a Native allotment has previously been rejected by this Board. Ann McNoise, 20 IBLA 169, 173 (1975); Georgianna A. Fischer, 15 IBLA 79, 81 (1974).

by appellant herself. An evidentiary hearing is not necessary where there is no dispute as to any material fact and the sole question presented is a legal issue. Ann McNoise, 20 IBLA 169, 171 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Martin Ritvo
Administrative Judge